

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 12-071

ERIC T. DALY,
Claimant–Petitioner,

v.

R.J. REYNOLDS and ACE ESIS, INC.,
Employer-Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 10-193A, OWC No. 655062

Michael J. Kitzman, Esquire for the Petitioner
Anthony J. Zaccagnini, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ HENRY W. MCCOY and JEFFREY P. RUSSELL,² *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the April 13, 2012, Compensation Order on Remand (COR2) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for continuing medical treatment. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

The fact underlying this claim are set forth in *Daly v. R. J. Reynolds*, CRB No. 11-058, AHD No. 10-193A, OWC No. 655062 (January 10, 2012). The facts remain the same.

¹ Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

² Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-03 (October 5, 2011).

Procedurally, on May 27, 2011, the ALJ issued a Compensation Order denying Mr. Eric T. Daly's request for authorization for continuing medical treatment and payment of outstanding medical bills.³ Because the ALJ had applied the presumption of compensability to the issue of reasonableness and necessity of ongoing treatment, the matter was remanded by the CRB for analysis of the evidence in accordance with the applicable law:

On remand, the ALJ shall consider the evidence and issue a new decision as to whether the claimant is entitled to continuing psychiatric treatment in the form of telephonic therapy from Dr. Smothers. In reaching this decision, the ALJ should not utilize a presumption-type analysis but should analyze the record evidence and determine whether the claimant met his burden of proving, by a preponderance of the evidence, that the proposed treatment plan is reasonable and necessary.^[4]

On January 31, 2012, the ALJ issued a Compensation Order on Remand (COR1).⁵ The ALJ denied Mr. Daly's claim for continuing telephone therapy with Dr. Smothers because "the [ALJ] is not inclined to allow claimant continuing telephone therapy." Another appeal followed resulting in a Decision and Remand Order (DRO2) on April 3, 2012.⁶ In that DRO2, the CRB remanded the COR1 for further findings on what medical opinion is relied upon when coming to the ultimate conclusion that telephonic therapy is not reasonable or necessary. The ALJ was also cautioned to confine any medical opinions to what is expressed in the record and that "drawing conclusions from facts not in evidence is reversible error." The CRB also reminded the ALJ to follow the dictates of the January 10, 2012 DRO and analyze whether or not the Claimant had proven, by a preponderance of the evidence, whether the proposed treatment is reasonable and necessary.

On April 13, 2012, the COR2 was issued denying the Claimants request for ongoing treatment.⁷ The ALJ found that the CRB's "directive that the preponderance of the evidence test must be utilized in determining the entitlement to medical expenses is clearly misplaced and must be superseded."⁸ The ALJ then went on to use the same rationale as in the COR1 to deny the claim as well as using the recommendations outlined in A Guide to the Essentials of a Modern Medical Practice Act, Tenth Edition (MMPA) to find that Dr. Smothers committed a felony in engaging in telephonic treatment. The ALJ ultimately found the opinion of Dr. Smithpeter more persuasive.

The Claimant timely appealed. The Claimant appeals the COR2 for the following reasons:

³ *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (May 27, 2011).

⁴ *Daly v. R. J. Reynolds*, CRB No. 11-058, AHD No. 10-193A, OWC No. 655062 (January 10, 2012). The payment of certain medical treatment by Dr. Kenneth R. Smothers in 2009 and 2010 was not appealed.

⁵ *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

⁶ *Daly v. R. J. Reynolds*, CRB No. 12-023, AHD No. 10-193A, OWC No. 655062 (April 3, 2012).

⁷ *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (April 13, 2012).

⁸ *Id* at 3.

- The Compensation Order on Remand does not apply the proper legal analysis;
- The Compensation Order on Remand fails to address the Utilization Report;
- The Compensation Order on Remand relies upon no record evidence;
- The Compensation Order on Remand reaches medical conclusions not supported by substantial evidence;
- The Compensation Order on Remand gives improper weight to evidence in the record; and,
- The Compensation Order on Remand reaches Findings of Fact without reference to any evidence.

The Employer argues that the COR2 is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Claimant first argues that the ALJ fails to apply the proper legal analysis as instructed by the CRB. Specifically, the Claimant argues since the COR2 "does not use the applicable legal standard to weigh the evidence, the Compensation Order on Remand cannot be consistent with the law and must be vacated and remanded." Claimant's Argument at unnumbered page 6.

A review of the COR2 reveals the following discussion:

It has been well entrenched in our Act that once causality of the accidental injury has been established or stipulated, right to medical expenses attendant thereto is also established. Should there arise subsequently a question on the propriety of continuation of those medical expenses, the presumption of causality (stipulated in this case) which subsumed the causality of medical expenses, should be controlling. As such, on the required burden of proof, it is the substantial evidence test, applicable to the causality, not the preponderance of the evidence test, that properly applies. Thus, to require an analysis thereto under the preponderance of the evidence would mean determination under the auspices of right to receive wage loss benefits. This is inconsistent with the Court of Appeal's holding that the right to medical expenses is to be addressed "separate and distinct from the right to income benefits." *Safeway Stores, Inc. v. District of Columbia Department of Employment Services*, 832 A. 2d 1267 (D.C. 2003)(quoting *Santos v. District of Columbia Department of Employment Services*, 536 A. 2d 1085, 1089 (D.C. 1988)). See also 2 A. Larson, THE LAW OF

WORKERS' COMPENSATION § 61.11(b) at 10-773 (1987). Thus, congruent to this rationale, the requisite burden of proof in determining the entitlement to medical expenses should also be distinguishable from the entitlement to the wage loss benefits. As such, in light of the Court's unambiguous precedent thereto, the CRB's directive that the preponderance of the evidence test must be utilized in determining the entitlement to medical expenses is clearly misplaced and must be superseded.⁹

A review of the record shows the above language is virtually identically to the language utilized in the COR1. We again are forced to remand the case back to the ALJ to apply the proper burden of proof as enunciated in our January 10, 2012 and April 3, 2012 Remand Orders. The ALJ should analyze the record evidence and determine whether the claimant met his burden of proving, by a preponderance of the evidence, that the proposed treatment plan is reasonable and necessary.

We also remind the ALJ what we stated in the COR2,

As this ALJ has been reminded previously: [I]t is up to the District of Columbia Court of Appeals to determine whether or not the CRB is correct or incorrect. This concept is the best way to insure prompt resolution of disputes in an orderly, predictable, and equitable fashion in a manner that maximizes the efficient use of limited administrative and judicial resources.^[10]

In order to avoid another unnecessary appeal, the ALJ is reminded again it is up to the District of Columbia Court of Appeals to determine whether the CRB is correct or incorrect.¹¹

The Claimant next argues the ALJ failed to address the Utilization Review report of Dr. Salma Khan in coming to the determination that the requested telephonic therapy is neither reasonable nor necessary. The Claimant argues the COR2 makes no reference to the mandatory procedures for determining the reasonableness and necessity of the requested medical care, and as such, it cannot be said the COR2 is supported by the substantial evidence in the record and is not in accordance with the law. A review of the COR2 shows a lack of any reference or commentary on the UR report. This is in error.

We are aware that we stated in the DRO2,

When the issue for resolution is reasonableness and necessity of medical treatment, the utilization review process is mandatory.¹² Once a utilization review report has

⁹ *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062, 3 (April 13, 2012).

¹⁰ *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 11-098, AHD No. 10-139, OWC No. 657877 (January 26, 2012).

¹¹ We also remind the ALJ the definition of appellate review which is the “examination of a lower court’s decision by a higher court, which can affirm, reverse, modify, or vacate the decision.” Black’s Law Dictionary, Ninth Edition. In adhering to the principle of appellate review, only the DCCA can supersede the CRB.

¹² See *Gonzalez v. UNNICO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

been submitted into evidence, that report is not dispositive but is entitled to equal footing with an opinion rendered by a treating physician.¹³ The ALJ

is free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ's weighing of the competing medical evidence and [the ALJ] is free to accept either the opinion of treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.^[14]

While the ALJ did not mention Dr. Khan in the COR2, we are cognizant that in the original CO the ALJ did analyze the utilization review and accorded Dr. Khan equal status with that of the treating physician. However, we do agree with the Claimant's argument that the ALJ is impermissibly adopting the diagnosis of the UR and opining that the Claimant is suffering from an "adjustment disorder." The purpose of a UR report is to render an opinion regarding the reasonableness and necessity of treatment, only.¹⁵ As such, adopting the diagnosis of the UR report, and not that of the treating physician or IME, is in error. Both the treating physician and the IME opine that the Claimant has post traumatic stress disorder. The issue UR is to aid in deciding is the reasonableness and necessity of telephonic therapy. The ALJ, upon remand, shall analyze the UR report, in light of the evidence of the record and the statutory limits of UR. Stated another way, the ALJ cannot use the diagnosis of the UR provider when assessing whether the telephonic therapy is reasonable and necessary.

Moreover, when assessing the opinions of the physicians, the ALJ is reminded to assess their opinions within the confines of the Workers Compensation Act (the "Act") and regulations as well as case precedent. We must agree with the Claimant's argument, that the ALJ's reliance on the MMPA as a basis to reject Dr. Smother's opinion is in error. In the COR2, the ALJ relies upon MMPA, for the proposition that Dr. Smothers telephonic therapy was a felony. A review of the introduction and preamble indicates that this guide is meant to "serve as a guide to those states that may adopt new medical practice acts or may amend existing laws" and "to encourage the development and use of consistent standards, language, definitions and tools by boards responsible for physician regulation." Employer's Exhibit 4 at 160. In essence, it serves as a recommendation to various state medical boards and legislatures. It is not law and it is error for the ALJ to conclude that Dr. Smothers' alleged violation of these recommendations constituted a felony without reference to a District of Columbia statute to that effect, and then use this erroneous conclusion as a basis to reject Dr. Smothers opinion. Upon remand, the ALJ shall assess the weight of Dr. Smothers in accordance with the Act and current case law and without any reference to any felonious conduct as there is no evidence to support such an assertion.

¹³ See *Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010).

¹⁴ *Daly v. R. J. Reynolds*, CRB No. 12-023, AHD No. 10-193A, OWC No. 655062 (April 3, 2012) quoting *Green v. Washington Hospital Center*, CRB No. 08-208, AHD No. 07-130, OWC No. 628552 (June 17, 2009).

¹⁵ DCMR § 232.4 states "the employee, employer or the Office may initiate the review, *accepting as a given the diagnosis of injury*, where it appears that the necessity, character or sufficiency of medical services is improper or clarification is needed on medical service that is scheduled to be provided." (Emphasis added).

The Claimant also argues the ALJ makes general assertions regarding the Claimant that are not supported by the record evidence. “In rejecting the claim for medical treatment, the Compensation Order on Remand alleges that the injured worker could be faking his voice, concealing his expressions, and reaches the medical conclusion that only in-person therapy is sufficient to establish a treatment plan for adjustment disorder.” The Claimant argues this is in error as there is no record evidence to support these contentions. We agree.

As we have stated previously,

The ALJ determined 1. there is “a risk that claimant could aptly embellish his symptoms over the phone by faking his voice and concealing his expressions,”¹⁶ 2. “an in-person treatment vis-a-vis a phone therapy is imperative in properly diagnosing and planning an ameliorative therapy, especially where claimant complains of an adjustment disorder with depressed mood, panic attacks, anxiety and insomnia,”¹⁷ and 3. “the need for an ongoing telephonic psychotherapy also becomes suspect in light of its unproductiveness thus far and claimant's well observed and reported level of functioning otherwise in the society.”¹⁸ Even if an ALJ may draw reasonable inferences from the evidence,¹⁹ without substantial evidence in the record to support such inferences, those inferences cannot be upheld on appeal, particularly when those inferences go beyond legal conclusion into the realm of medical conjecture.

If there is evidence in the record to support the ALJ's conclusions, the ALJ remains free to cite that evidence in support of those conclusions. If, however, there is no evidence in the record to support the ALJ's conclusions, the ALJ exceeds the scope of authority in rendering medical opinions.²⁰

We again remand the case with the same directions as before. The ALJ is to make findings of fact and conclusion of law based on the evidence in the record.

¹⁶ *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

²⁰ *Daly v. R. J. Reynolds*, CRB No. 12-023, AHD No. 10-193A, OWC No. 655062 (April 3, 2012). See also *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the April 13, 2012 Compensation Order on Remand are not supported by the substantial evidence in the record and is not in accordance with the law. The Compensation Order on Remand is **VACATED** and **REMANDED** for further findings and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

June 19, 2012

DATE